STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

TERRY L. STEVENS,

Plaintiff,

v.

ALLIED BUILDERS, INC., CHARLES W. PECORELLA, MATTEO PECORALLA, JOHN J. PETRONIO, CARL V. PETRONIO, and GARY L. NANNI,

Defendants.

DECISION AND ORDER

Index #2008/12363

Respondents, Allied Builders, Inc., Charles W. Pecorella, Matteo Pecorella, John J. Petronio, Carl V. Petronio, and Gary L. Nanni, move for an order granting summary judgment and dismissing the petition. Respondents also seek judgment on their first and/or second cross claims. Petitioners cross move pursuant to BCL §1118(c) for an order directing respondents to post a bond or other security to secure their purchase of petitioner's shares at their fair value. An additional cross motion by petitioner was received by the court on February 26, 2008. In that additional cross motion petitioner seeks an order pursuant to BCL §§1104-a(c) and §624 directing respondents to deliver to petitioner copies of the corporate tax returns for the last five years and annual financial statements for the last five years.

Petitioner commenced this action seeking dissolution of Allied Builders, Inc. pursuant to BCL §1104-a, alleging

oppressive action taken by the controlling shareholders and diversion of assets of the corporate for non-corporate purposes by the controlling shareholders. Respondents, Matteo Pecorella, Charles W. Pecorella, John J. Petronio, and Carl V. Petronio, are all founding shareholders of Allied and have been its only directors since 1990. The individual respondents hold 4,504 shares of Allied's 9,004 outstanding shares of stock. The other individual defendant, Gary L. Nanni, holds 2,250 shares of Allied stock, which he acquired in a series of purchases from Allied and the founding shareholders between 1985 and 1999.

Petitioner was a vice president at Allied from 1985 until the latter half of 2008. The circumstances whereby he ceased to work for Allied are the source of some disagreement between the parties. Petitioner, like Nanni, holds 2,250 shares of Allied stock that he acquired in a series of purchases from Allied and the founding shareholders between 1985 and 1999.

This petition came before the court by order to show cause on September 4, 2008, wherein petitioner sought an order dissolving Allied pursuant to BCL §1104-a. The order further mandated the production of certain financial documentation and publication, filing, and service of the order to show cause pursuant to BCL §1106. The original return date for the order to show cause was adjourned, and prior to the adjourned date, the parties entered into a Stipulation approved by the court on

October 7, 2008. The Stipulation limited the issues presented by the petition to issues regarding the applicability of certain shareholder option agreements. The Stipulation provides, in relevant part:

> 2. Allied and its Shareholders contend that Stevens is required to sell his shares in the corporation in accordance with the terms of a certain Option Agreement made as of June 25, 1996 ("Option Agreement") for any or all of the foregoing reasons:
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> a. As required by paragraph 7(c), because the commencement of this proceeding is a "Transfer of Stock" as defined by the Option Agreement;
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> b. Pursuant to paragraph 8(c), because the commencement of this proceeding to dissolve the corporation is an offer to sell his shares, which has been accepted by the Shareholders; and
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> c. Pursuant to paragraph 8(c), the purchase price for any share determined pursuant to BCL §1118 shall be that contract price as determined by the Option Agreement.
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> 3. Stevens disputes that the Option Agreement applies, or controls the price for the purchase of his shares, and asserts that the shares should be purchased at "fair value" as determined under BCL §1118. . .
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> 5. If the Court determines that the Option Agreement controls the purchase and sale of Stevens' shares, this proceeding will be dismissed, on the merits, subject to appeal. If the Court rules that the Option Agreement does not control, then Allied and the Shareholders may proceed to file and timely perfect an appeal. . .
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> 6. If a court having final jurisdiction determines that the Option Agreement does not

> apply as set forth in paragraphs 2.(a)-(b), inclusive, above, then Allied shall be deemed to have elected pursuant to BCL §1118 to purchase Petitioner's shares, with "fair value" to be determined either by the Option Agreement, if the court determines that it controls the determination of price under BCL §1118, or in accordance with BCL §1118, if the Court determines that the Option Agreement does not control price under Section 1118, and the Court will proceed, subject to normal discovery and a reasonable discovery order, to take proof on the issue of "fair value" pursuant to BCL §1118 and render a decision thereon. Both parties reserve the right to appeal from the Court's "fair value" determination, and agree that any execution and other actions following such determination shall be stayed until all appeals are exhausted and a final decision has been made.

Respondents served their verified answer with defenses and counterclaims to the petition on October 27, 2008. In the answer respondents deny acts of oppression, diversion of assets, and aver that there was never an agreement as to a stock buyout, that petitioner resigned on August 4, 2008, and that the payment of retiree benefits does not constitute a diversion of corporate assets. Respondents' First Objection in Point of Law and Counterclaim seeks a declaration that section 7 of the Option Agreement was triggered by the commencement of the dissolution proceeding, thereby depriving petitioner of standing to maintain the dissolution proceeding and concomitantly compelling petitioner to sell his shares in accordance with the procedures and at the price set forth in section 7. The Second Objection in

Point of Law and Counterclaim seeks the same declaration in regard to Section 8(c) of the Option Agreement, dismissal on standing grounds, and an order compelling the sale of petitioner's shares in accordance with the Section 8 formula, which incorporates the Section 7 formula. The Third Counterclaim seeks damages by reason of the institution of the dissolution proceeding, which is alleged to be a breach of section 8(c) of the Option Agreement. The Third through Sixth Objections in Point of Law and affirmative defenses will be rendered moot by this decision and order, and therefore are not set forth.

As set forth above, the parties have stipulated to a procedure whereby petitioner's shares are to be purchased by respondents, either pursuant to the Option Agreement, if it controls, or pursuant to BCL §1118 if it does not. For the reasons stated below, the court finds that §7 applies, that §8(c) does not, and that respondents are entitled to dismissal without prejudice by reason of the grant of summary judgment on the First Objection in Point of Law and Counterclaim. The order of presentation of the various motions presupposes familiarity with the grant of summary judgment declaring that §7 applies to the commencement of a dissolution proceeding such as this one.

Motion to Dismiss

Respondents seek dismissal of the petition based upon CPLR 3211(a)(3) and (7). CPLR 3211(a)(3) provides for dismissal on

the grounds that the party asserting the cause of action lacks capacity to sue. This defense is waived if it is not raised in a pre-answer motion or in the answer. The issue of standing turns upon "[t]he existence of an injury in fact - an actual legal stake in the matter being adjudicated - ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" Soc. of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 (1991), *quoting* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 220-21 (1974).

Standing

Respondents contend that petitioner lacks standing because he does not have the ability to vote his shares.

BCL 1104-a states:

> (a) The holders of shares representing twenty percent or more of the notes of all outstanding shares of a corporation. . . entitled to vote in an election of directors may present a petition of dissolution . . . .

Citing this provision, respondents contend that petitioner lacks standing and capacity to prosecute the petition. It is alleged that petitioner is not entitled to vote his shares by virtue of a Voting Agreement and related Irrevocable Proxy. The Voting Agreement states:

> FIRST: TERRY STEVENS agrees to take all actions necessary to cause all shares of the Corporation now or at any time hereafter owned or controlled by him to be voted in

> accordance with the unanimous agreement of CHARLES PECORELLA, MATTEO PECORELLA, JOHN J. PETRONIO, and CARL V. PETRONIO, or of the survivors (hereinafter "Designees") at any meeting of the shareholders of the Corporation held for any purpose whatsoever, including, but not limited to, meetings for the election of directors. . .
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> SECOND: TERRY STEVENS shall grant and cause to be granted to CHARLES PECORELLA, MATTEO PECORELLA, JOHN J. PETRONIO, and CARL V. PETRONIO, or their survivors, to act by unanimous agreement, irrevocable proxies giving them the right to attend all meetings of the shareholders of the Corporation with full power to vote the shares now or at any time hereafter owned by him with the same effect that he might have were he present at such meeting, giving the said Designees full power of substitution and revocation, and power to act on behalf of the Corporation and the shareholders thereof in any and all proceedings, whether at meetings of the shareholders or otherwise, wherein the vote or written consent of the Corporation's shareholders may be required or authorized by law.

The corresponding Irrevocable Proxy contains equivalent language. Respondents conclude that, although petitioner owned 24.99% of the outstanding shares of Allied, he does not qualify under BCL §1104-a because he was not entitled to vote those shares, having relinquished any such right to the founding shareholders via the Voting Agreement and Irrevocable Proxy. Petitioner contends that he is unequivocally the holder of 2,250 shares of voting common stock and that the Voting Agreement merely limits his discretion as to how to vote his shares but stops short of absolutely depriving him of his right to vote.

The court agrees with petitioner's interpretation of the impact and import of the Voting Agreement and Irrevocable Proxy. Irrespective of whether petitioner has the ability to actually vote his shares, he is the owner and holder of those shares pursuant to BCL §1104-a(a). Such a finding is consistent with the legislative intent of "liberaliz[ing] criteria for judicial dissolution to help the shareholder(s) in such situations who want(s) out." Application of Topper, 107 Misc.2d 25, 32 (Sup. Ct. N.Y. Co. 1980), *citing* 6 McKinneys Consolidated Laws, BCL Apps 1 and 2, See, Commentaries by Profs. George D. Hornstein of New York University School of Law and by Harry G. Henn of Cornell Law School. It is uncontroverted that petitioner holds the requisite percentage of shares necessary under BCL §1104-a(a), and it is further uncontroverted that the shares have voting rights. In this situation the right to vote has been limited by the Voting Agreement and Irrevocable Proxy, but the shares are "entitled" to a vote. It just happens that here, the agreements limit petitioner's ability to exercise the vote of his own free will. On this issue, petitioner's lack of standing has not been established. He has standing to institute the proceeding and maintain it until it is determined that the buy out procedures under the Option Agreement actually lead to the purchase and sale contemplated by that agreement. Matter of In re Dissolution of Penepont Corp., Inc., 96 N.Y.2d 186, 193 (2001); Matter of

Dissolution of El-Roch Realty Corp., 48 A.D.3d 1190, 1192 (4th Dept. 2008).

Notwithstanding the foregoing, where the option to purchase triggered by institution of the dissolution proceeding has been exercised, respondents are entitled to dismissal under the authority of Weiner v. Anesthesia Assocs. of Western Suffolk, P.C., 203 A.D.2d 455, 456-57 (2d Dept. 1994) and Hesek v. 245 S. Main St., Inc., 170 A.D.2d 956, 957 (4th Dept. 1991); Doniger v. Rye Psychiatric Hosp. Center, Inc., 122 A.D.2d 873 (2d Dept. 1986). See also, In re Dissolution of Penepent Corp., Inc., 96 N.Y.2d 186, 193 (2001). These cases establish that petitioner's decision to file this action triggered the thirty day option period of section 7 and the automatic imposition of an irrevocable option to purchase the shares by respondents. Respondents establish without contradiction that they exercised this option via written notice on September 25, 2008. Consequently, petitioner became immediately and automatically divested of his ownership in shares of the corporation and at that point no longer had standing to maintain this action.

As discussed *infra*, the court holds that Section 7 applies to value petitioner's stock. Weiner, Hasek, and the more recent case of Matter of the Dissolution of El-Roh Realty Corp., 48 A.D.3d 1190 (4th Dept. 2008), control and compel the conclusion that petitioner, who was divested of his ownership interest in

Allied by respondents' exercise of the option on September 25, 2008, no longer has standing to maintain this action. A petition for dissolution will be dismissed for lack of standing where an agreement between the parties divested petitioner of interest in his shares. See Weiner, 203 A.D.2d at 457. See also, Hesek, 170 A.D.2d at 957 (dismissing a petition for dissolution where agreement permitted the corporation to repurchase shares upon death of shareholder, resulting in lack of standing for executrix of estate). Lack of standing in such a circumstance has recently been upheld by the Fourth Department in El-Roh where the court acknowledged that an offer to purchase petitioner's shares pursuant to an agreement would lead to dismissal of a proceeding for dissolution if the sale were consummated. See El-Roh, 48 A.D.3d at 1192.[1] The motion to dismiss for lack of standing is granted without prejudice.

Failure to State a Cause of Action

Respondents also move to dismiss for failure to state a cause of action. On a motion to dismiss pursuant to CPLR §3211(a)(7) the complaint, or petition, must be given every

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[1] The dissolution proceeding in El-Roh was not dismissed, but held open because, in that case, it had not been determined whether the shares would indeed be transferred pursuant to the buy-out provision. By contrast, here, the option to purchase was exercised, and therefore the parties' rights are governed by the Agreement, not the BCL. This aspect of El-Roh means that the dismissal should be without prejudice to re-institution if, for any reason, the sale contemplated by section 7 is not consummated, an eventually the court does not expect to occur.

favorable inference and the allegations therein are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dep't 1992). When considering such a motion, it is the task of the court to determine whether, "'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995)(citations omitted). If the court determines "that plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint, or petition, is deemed legally sufficient. Id.

Here, the petition alleges that the respondents have oppressed petitioner and have threatened to divert Allied's assets for non-corporate purposes. Respondents' motion papers do not include argument relative to how the allegations of the petition fail to state a claim for relief. The court's review of the petition reveals that the allegations made therein do state a claim for relief. To the extent a motion to dismiss pursuant to CPLR 3211(a)(7) has been made, the motion is denied.

Summary Judgment

Respondents also seeks dismissal of the petition on summary judgment, as well as an order granting them judgment on their first and/or second counterclaims. It is well settled that "the proponent of a summary judgment motion must make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003)(citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

Both parties seem to agree that the Stipulation and Order, dated October 7, 2008, and signed by all counsel and the court, obviated the threat of corporate dissolution by providing a

mechanism for the purchase of petitioner's stock, either pursuant to the Option Agreement or pursuant to the election for purchase under BCL §1118. The parties' respective contentions relative to whether petitioner was wrongfully terminated or wrongfully oppressed are no longer relevant to these proceedings. See Matter of Pace Photographers, Ltd., 71 N.Y.2d 737, 745 (1988) ("That election, which respondents chose to make by letter to petitioner at the very outset of the dissolution proceeding - even before its answer, and unrelated to the fate of the petition - relieved petitioner of the need to prove the allegations underlying his petition"). The court need not reach the merits of the petition. See Gargano v. King Motorcycle Corp., 112 A.D.2d 225 (2d Dept. 1985). The motion for summary judgment seeking dismissal of the petition insofar as it alleges wrongful terminates and wrongful oppression is granted.

Respondents also seek summary judgment on the first and second counterclaims. The first counterclaim alleges that petitioner is obligated to sell his shares to the founding shareholders in accordance with the procedures and for the value stated in §7 of the Option Agreement. The second counterclaim alleges that the founding shareholders elected to purchase petitioner's shares in Allied pursuant to §8(c) of the Option Agreement, and seeks to compel petitioner to comply with the same. The balance of this analysis thus focuses upon the

applicability (or not) of the Option Agreement, the inquiry contemplated by the Stipulation and Order.

The Option Agreement, dated June 25, 1996, states in relevant part:

> 1. Grant of Option; Option Period. Shareholders hereby grant Purchaser the option to purchase in whole or in part at any time during the option period four hundred eighty-seven and one-half (487.5) shares of the capital stock of the Corporation from each of them, for a total of 1,950 shares, upon the terms and conditions set forth herein, *such option to be exercisable no later than ten (10) years from the date of this Agreement* (such period hereinafter called "Option Period"). It is intended by this Agreement to grant Purchaser an option to own 24.5% of the shares of the capital stock of the Corporation (emphasis added). . .
>
> 7. Restriction on Shares. . .
>
> a. Transfer of Stock. Except as may be otherwise provided for herein, Purchaser shall not sell, transfer, assign, give, bequeath, hypothecate, pledge, create a security interest in, or lien on, encumber, place in trust (voting or other) or otherwise dispose of all of any portion of the shares of the capital stock of the Corporation, or any interest therein, now owned or hereafter acquired, held or controlled by Purchaser, whether voluntarily or through any bankruptcy or other insolvency proceedings, adjudication of insanity, death or otherwise. . . unless and until each of the terms and conditions of this Agreement have been met. . .
>
> 8. Option to Shareholders to Purchase Shares Upon Termination of Employment of Purchaser. Upon termination of employment of Purchaser by the Corporation for any reason prior to the period ending ten years from the date of

> this Agreement. . . the Shareholders shall have the irrevocable option of acquiring all, but not less than all, of the shares owned by Purchaser as if the provisions of paragraphs 7c, 7d, 7e, and 7f were in effect. . .
>
> c. Sections 1104-a and 1118 of BCL. Purchaser and Shareholders agree that provisions of this paragraph 8 shall apply to any actions or proceedings brought pursuant to sections 1104-a and 1118 of the New York Business Corporation Law ("BCL"). The filing of a petition seeking dissolution of he Corporation pursuant to BCL 1104-a shall be deemed to be an offer pursuant to this paragraph 8 to sell all shares of the Corporation then owned by the petitioner or subject to any option created hereunder (the "Shares"). In such event, the provisions of BCL 1118 shall supercede the times specified in paragraphs 7c, 7d, and 7f for acceptance of such offer. In the event that the Shareholders shall elect pursuant to BCL 1118 to purchase the Shares, the fair value of the Shares and the terms and conditions of the purchase of the Shares shall be as set forth in paragraphs 7c, 7d, and 7f hereof with the date of filing the petition under BCL 1104-a substituted for the date of the termination of the petitioner's employment. The closing of the purchase of the shares shall take place within thirty (30) days following he date of the election by the Shareholders, pursuant to BCL 1118 and shall be conducted as set forth in Section 7(d). The Shareholders shall not be required to post a bond pursuant to BCL 1118(c)(2). The parties are knowingly and intentionally entering into this agreement to provide the Purchaser with a method of recouping his investment in the Corporation and to minimize the expense of litigation should a proceeding under BCL 1104-a be commenced. . . .

Following the original Option Agreement, the parties entered into two amendments. The first was dated December 30, 1996, and

provided Ted Holdworth and Nanni with an option to purchase certain shares at stated prices, and stated in conclusion: "Except as provided herein, all other terms, provisions and conditions of the June 25, 1996 Option Agreement remain in full force and effect." The Second Amendment various amendments to the option agreements previously executed and concluded with the following: "Except as provided herein, all other terms, provisions and conditions of the TLS Option Agreement and the TLS Amendment to Option Agreement remain in full force and effect." Id. at Exhibit J at 6. The Second Amendment is dated June 30, 1999. Thus, despite the various amendments, and respondents' contention to the contrary, neither amendment purported to extend the original 10 year option period.

As alluded to above, respondents contend, and this court agrees, that the unambiguous language of §7 is invoked by the institution of a dissolution proceeding. El-Roh, 48 A.D.3d at 1991-92; Hesek v. 245 Fourth Main St., Inc., 170 A.D.2d 956 (4th Dept. 1991); Matter of Doniger v. Rye Psychiatric Hosp. Center, Inc., 122 A.D.2d 873, 876-77 (2d Dept. 1986). The failure of §7 to explicitly enumerate as one of its triggering mechanisms the institution of a dissolution proceeding does not deprive §7 of its unambiguous effect on the petition in this case. This much was made clear in In re Johnsen v. ACP Distr., Inc., 31 A.D.3d 172, 177-78 (1st Dept. 2006) and Peter A. Mahler & Michael A.H.

Schoenberg, Outside Counsel: Dissolution Petition Can Unwillingly Trigger Stock Buyback, N.Y.L.J., vol. 236, July 21, 2006 at p.4, col.4 (under Johnsen, unambiguous language sweeps in commencement of a dissolution proceeding despite lack of specific reference to it in the RFR buyback provisions). Accordingly, application of §7, which does not have a 10 year term, is established on this record.

I fully accept that the unambiguous provisions of Section 7 the Option Agreement was intended to serve as a general shareholders agreement for this and other purposes. The proof is in Section 19 which spells out the events intended by the parties to serve as a termination of the agreement. Because expiration of the Option Period is not among them, the doctrine of *expressio unius exclusio alterius* applies. In short, petitioner's reading of the agreement to the contrary would produce a result wholly at odds with the evident intent of the parties and otherwise lead to an illogical, nonsensical, and absurd application of many of the agreement's terms.

Nor does the explicit mention of a dissolution proceeding in §8, which governs Termination of Employment "for any reason prior to the period ending ten years from the date of this Agreement," §8 (preamble), deprive §7 of its unambiguous nature and effect. Petitioner remained employed by the corporation until August 4, 2008, well after expiration of the option period of the 1996

agreement. Because as petitioner contends the two amendments did not serve to extend the options period, §8 has no application to this case. The motion for summary judgment on the Second Objection in Point of Law and Counter-claim is denied.

The motion for summary judgment on the third counterclaim is denied. Although the agreement spells out the intended effect of petitioner's decision to commence a dissolution proceeding, it does not make that occurrence a breach of its provisions. In any event, petitioner is entitled as set forth above to maintain a dissolution proceeding under agreements such as this one to ensure that his offer to sell is exercised and consummated. El-Roh, 48 A.D.3d at 1192.

The motion for summary judgment on the remaining defenses is dismissed is academic.

Bond

As to petitioner's motion seeking a bond pursuant to BCL §1118(c)(2), the court finds a bond cannot be issued as requested by petitioner. On this issue respondents submit the affidavit of Louis J. Camarella, Jr., a partner with the accounting firm Eldredge, Fox & Porretti, LLP and Director of the firm's Business Valuation, Forensic & Litigation Support Group. Mr. Camarella, as an expert in this field, opines that documents used by petitioner to set an amount for the bond are improperly used for that purpose because they were created as of a certain date and

for an intended user and an intended purpose. The application for a bond is denied based upon the affidavit testimony of Mr. Camarella.

Motion to Comel

On the strength of respondents' offer to provide the materials requested, the motions for dismissal and for summary judgment, insofar as granted as set forth above, are granted on condition of fulfillment of respondents' promise to produce.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 9, 2009
Rochester, New York